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In Defense of Secession

GETTING IT RIGHT: MARKETS AND CHOICES

Robert J. Barro
MIT Press, 1996, xv + 191 pgs.

If one passage in Robert Barro's excellent book attracts notice in the wrong quarters, he is liable to find himself in serious trouble. Our author, a free-market supporter in the inhospitable climate of Harvard, has previously given evidence of a penchant for nonconformity. But now he goes one step farther: he challenges one of the most entrenched taboos of the American Establishment.

As Barro points out, the United States has tended to react with suspicion toward secessionist movements: "if the U.S. government had supported the right of secession in some other parts of the world, such as the Soviet Union, then it would have indirectly challenged the basic premise of the Civil War. Why was it desirable for Soviet republics to have the right to secession and undesirable for U.S. states to have the same rights" (p. 27)?

A Quarterly Review of Books, by David Gordon

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Surely Barro knows that the sanctity of the Union cause is a given. How can he dare to challenge it? Against the conventional wisdom, Barro adduces some simple facts. "The U.S. Civil War, by far the most costly conflict ever for the United States..., caused over 600,000 military fatalities and an unknown number of civilian deaths, and it severely damaged the southern economy. Per capita income went from about 80 percent of the northern level before the war...to about 40 percent after the war.... It took more than a century after the war's end in 1865 for southern per capita income to reattain 80 percent of the northern level.... Instead of being the greatest of American presidents, as many people believe, Abraham Lincoln may instead have presided over the largest error in American history" (pp. 26–27).

One can easily conjecture how defenders of Father Abraham will respond. Was not the cost of the war justified to free the slaves? To this, Barro has an effective rejoinder. "Everyone would have been better off if the elimination of slavery had been accomplished by buying off the slaveowners—as the British did with the West Indian slaves during the 1830s—instead of fighting the war" (p. 28).

And if this suggestion is dismissed as unrealistic, our author is still not defeated. If the North had accepted Southern secession, what would have become of slavery? Other nations in the Western hemisphere, most notably Brazil, abolished slavery without war: why would matters have been any different in an independent Confederacy? The spirit of the times was against indefinite continuance of the "peculiar institution."

Barro's aim extends beyond making a historical point, however important. He maintains that economic considerations do not mandate large nations: the much-vaunted efficiency advantages of vast national size are spurious. "There is no relation between the growth or level of per capita income and the size of a country, measured by population or area. Small countries, even of populations as little as a million, can perform well economically, as long as they remain open to international trade" (p. 28).

Secession by no means stands alone among the political issues that Barro's economic analysis illuminates. He finds economic benefits in having a "relatively homogeneous

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population within a given state" (p. 30). Diverse ethnic groups pent up in a single state will tend to devote resources toward securing state patronage. The temptation to benefit at the expense of a rival race often proves too much to overcome, with great losses to economic efficiency. (Barro's argument, incidentally, was anticipated by Ludwig von Mises in *Nation, State, and Economy.*)

Given Barro's contention, it is surprising that he opposes "curbs on immigration" (p. iv); but even if he is unwilling to accept the implications of his own analysis, others will readily see where the argument leads.

I have so far emphasized Barro on political issues, since his remarks are here especially compelling; but he covers many other topics in this wide-ranging collection. The author, a leading member of the "rational expectations" school, has little use for Keynesian economics. According to Keynes, an "increase in aggregate demand due to the government's higher expenditure supposedly leads to so much utilization of underemployed labor and capital that output expands by more than the rise in government spending—that is, by a multiple greater than one. Thus, if the economy is operating at less than 'full employment,' then government programs are even better than a free lunch" (pp. 110–11).

I shall not end on a negative note because Barro does not deserve it. His fine book abounds in insights.

This famous hypothesis, Barro points out, cannot cope with a most inconvenient fact. Not a single instance of the so-called demand multiplier has been shown to exist. Contrary to the claims of many historians, the vast spending by the American government during World War II did not rescue us from the depression: "the data show that output expanded during World War II by less than the increase in military purchases.... No multiplier showed up in the United States during World War II, and none has been observed in other times and places" (p. 111).

I fear that I have so far disappointed my readers. I have had hardly a word of criticism of the book. A favorable notice of a non-Austrian economist in *The Mises Review*? Unthinkable! At best I can give only partial satisfaction. Some points in the volume indeed stand open to objection; but the book nevertheless is outstanding.

But, enough of praise: let's get on with what we have all been waiting for. Barro is most famous among economists for his defense of "Ricardian equivalence." Against claims

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that a budget deficit crowds out investment, our author demurs. Faced with a budget deficit, taxpayers will realize that taxes must eventually be raised to pay the bills.

This being so, they will, if rational, set aside money to pay for the tax increases they anticipate. What counts is not only current taxes, but the present value of future taxes. "[E]ach person subtracts his or her share of this present value [of taxes] from the present value of income to determine a net wealth position, which then determines desired consumption" (p. 93). Since anticipated future taxes affect consumer spending in the present, "taxes and budget deficits have equivalent effects on the economy" (p. 94).

Barro is right: World War II did not rescue us from the depression.

The objections to Ricardian equivalence are many and various, a fact of which our author shows himself well aware. For one thing, people cannot be sure what the government will do in the future. "Eventually" the bills must be paid; but eventually may be a long time, and perhaps taxpayers will not wish fully to take account now of a bill that may be indefinitely deferred. In the extreme case, it will not be they who pay, but a future generation of whom they know nothing. And (a point Barro does not here mention) a deficit can hardly always be equivalent in economic impact to taxes. Otherwise, a deficit might always be substituted for a tax; and no tax bill would ever fall due.

The case against Ricardian equivalence seems to me strong, but the point here is not principally an assessment of this hypothesis. Rather, the issue I wish to address is the way in which Barro confronts the objections to his view. He does not, surprisingly, respond by an endeavor to refute the counter arguments. Instead, he readily admits that "some of the objections to Ricardian equivalence are formally valid" (p. 94).

If so, why does he not abandon the thesis? Because "the quantitative implications of these points are unclear...the Ricardian view that budget deficits are unimportant may serve as a theoretically respectable first-order proposition" (p. 94). Put crudely, Barro is saying that it does not matter whether his hypothesis is false. All that counts is that it generate predictions that do not depart very much from the data.

For Barro, the pursuit of statistical significance is a categorical imperative. In contrast to Mises, for whom historical evidence can only illustrate economic theorems established by deduction, Barro directly derives supposed economic laws from statistical correlations. Thus, he endorses a supposed "iron law of convergence" that about two percent of the gap between a rich and poor country

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disappears each year. An Austrian would inquire of Barro why we should take this supposed "law" as more than a summary of past facts. Why need the law hold in future?

In another area, Barro seems also vulnerable to objection. Readers will, I trust, not be unduly surprised that this area is another departure from the Austrian approach. Barro's contention, if in my view mistaken, is characteristically ingenious. The wages of professional athletes in major sports, it seems, are "too high." What matters to fans in sports performance is not the absolute level of skill but how a performer does in comparison with his rivals. "The relative performance feature means that each team has too much incentive to hire the best athlete and each athlete has too much incentive to raise his or her level of performance...each time a player gets more skillful, he or she effectively reduces the skill of the other players" (p. 154).

The technical details of Barro's argument do not for our present purposes matter. Rather, what is of interest is the implicit standard Barro uses to condemn athletic salaries as "too high." It is the familiar model of completely efficient resource use, in which all "externalities" have been subjected to correction. But why should this model be taken as an ethical ideal by which to assess market performance? With their insistence on full awareness of presuppositions, Austrians know better than to assume without argument that this criterion should be accepted.

But, much as it goes against the grain, I shall not end on a negative note, because Barro does not deserve it. His fine book abounds in insights. The author's commendable skepticism about the economic benefits of democracy and his keen dissection of the "endangered species" regulations are especially compelling.

I have space for only one sample. "Most puzzling is the determination of the level of spending on a species once it has been listed [as endangered].... The key matter appears to be whether the animal has charismatic qualities.... Basically, people like bald eagles, and that is why they get so much attention" (p. 153). ✦

Time on Their Hands

THE ECONOMICS OF TIME AND IGNORANCE
Gerald P. O'Driscoll, Jr., and Mario J. Rizzo
Routledge, 1996 [1985], xxxiii + 265 pgs.

For once a publisher's blurb does not exaggerate. *The Economics of Time and Ignorance* has indeed been "one of the seminal works in modern Austrian economics" and the book's welcome reissue,

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with a new introduction, offers an opportunity for its examination here (The new introductory essay, "Time and Ignorance After Ten Years" is the work of Professor Rizzo alone; but the book's coauthor has read it [p. xxix, n. 1]).

Don't blame me—I didn't write this!

Assessment of the book is no easy task. Our authors, in their abundance, have given us not one book, but two. One of these is a valuable, if at times debatable, contribution to Austrian economics. The other is a philosophical account of time and ignorance, which might better have been titled "A Budget of Paradoxes." I shall endeavor to say something about both books, with greater attention to the second and its fallacious arguments. What else would you expect?

Economic actors constantly face uncertainty. This elementary fact, one would have thought, hardly needs stating. Anyone who has tried to make money in the stock market should be well aware of it. However obvious the pervasive fact of uncertainty, mainstream neoclassical economists ignore its implications. By contrast, Austrian economics (at least ideally) is well suited to incorporate uncertainty into its analysis.

This is the principal thesis of what I have termed the authors' first book, and they argue for it in convincing fashion.

Thus, a familiar neoclassical claim is that monopoly, in contrast to perfect competition, leads to a welfare loss. But the argument in support of this contention treats a monopolist "as knowing or being capable of discovering competitive equilibrium.... If, however, we relax the assumptions of standard theory, it is not clear that we can distinguish conceptually between the behavior of competitors and monopolists" (p. 144).

The monopolist does not have a filled-in textbook diagram in front of him and ought not to be judged by the standards of an unrealistic model. The authors' point is well taken; but their use of it to indict neoclassical economics is weakened by the fact that Kenneth Arrow arrives at conclusions somewhat like their own (pp. 144–45). Since Arrow is one of the world's foremost neoclassicals, the entire school can hardly be condemned on this score.

As the argument just presented indicates, the authors view with great suspicion attempts to treat equilibrium as a really existing state of affairs. In some respects, as it seems to me, their criticism of the use of equilibrium constructs goes too far. In particular, their objection to Mises's use of equilibrium misfires.

They remark: "Mises developed what he called an *argumentum a contrario*"; the "equilibrium construct can be used as a foil against which to compare

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actual market situations. Thus, if conditions a, b, and c together imply a certain equilibrium, then the absence of that equilibrium would imply that at least one of the conditions does not hold. Economic analysis then focuses on the forces responsible for this situation" (p. 82).

Against this, they note that the conditions for equilibrium are sufficient conditions, not necessary ones. But this prevents Mises from offering a "logically sufficient explanation for the 'failure' of actual processes. The absence of sufficient conditions does not imply the absence of the result predicted by the equilibrium construct.... Only the absence of all possible sufficient conditions (the conjunction of which is a necessary condition) would imply this" (p. 82).

Don't blame me—I didn't write this!

But Mises's point is perfectly in order. If Mises has correctly given sufficient conditions for equilibrium (a point our authors do not challenge), then the absence of equilibrium does indeed indicate that one of his conditions has not been realized. That is a perfectly valid (and obvious) argument by denial of the consequent.

That some other sets of conditions suffice for equilibrium is neither here nor there. Why should a theorist be interested in "logical sufficiency" in the sense our authors delimit? Surely the set of conditions to use are those the theorist finds illuminating, not "every possible set." After all, it is trivially easy to conjure up a set of sufficient conditions for equilibrium. The conjunction of Mises's set and "the moon is made of green cheese" is such a set. Must a theorist seek to incorporate it into an explanation of the failure of equilibrium to obtain? If not, what is the point of the authors' criticism?

That some other sets of conditions suffice for equilibrium is neither here nor there.

In a further application of their *leitmotif*, the inadequacy of neoclassical economics, O'Driscoll and Rizzo criticize attempts to show that economic, legal, and political rules are "efficient." Much of what they say makes eminent good sense, and Richard Posner and his disciples would profit from study of their remarks.

But one of their arguments seems to me in error. They say: the "rules themselves are adopted, at least in part, by an *a-rational* process. To suppose that...the legal framework is the product of rational choice only pushes back the question of the framework within which *that* choice was made. One would eventually be led into an infinite regress" (p. 122, emphasis in original).

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I do not think that one would. Suppose the rules are chosen by persons attempting to maximize their utilities. Why must there be a further question about the framework within which their choices are made? One is simply given people with certain ultimate preferences, and that is that. But perhaps, our authors will say, just this is an example of the "a-rational process" they have in mind. The preferences are not themselves determined by a rational criterion. But whoever among the proponents of efficiency said they were? The exact nature of the authors' objection eludes me.

Though the authors deal with important issues, the main arguments they advance seem to me uniformly mistaken.

Exception might be taken to other statements in the book's economic analysis. Why, for example, do they advance "maximal possible plan coordination" as a normative criterion, when they themselves state what appear to be insuperable problems for that standard (p. 118)? In fairness to them, I am uncertain from their language whether they do adopt it. But I think they do; and counterexamples cannot be swept under the rug as "issues unresolved."

But, regardless of these objections, their economic analysis merits careful attention. Their chief problem lies in what I call their second book. Their economic work, taken on its own terms, is not enough for them. No; they must set forward the foundations of their position in a philosophical analysis of time. Though they deal with important issues, the main arguments they advance seem to me uniformly mistaken.

To understand what they have in mind, we must return to our starting point, the uncertainty that faces economic actors. To our authors, this is more than a commonsense fact. Philosophical argument shows that the future is necessarily uncertain.

Does it? Let us examine a few of the arguments they offer. "Our first argument is derived from Karl Popper's demonstration that it is impossible for an individual to predict his own future knowledge." "Suppose P (predictor) has complete knowledge of his initial circumstances at t1,...and wishes to predict his knowledge at t3. Can this be done? P will take some finite amount of time, say until t2, in order to deduce his state of knowledge at t3. However, the knowledge gained at t2 will affect P's state at t3" (p. 25).

And should our hapless P try to incorporate the knowledge gained at t2 into his prediction, the problem recurs. In the time it takes him to do

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this, he has gained new knowledge, and so on.

Unfortunately, no support is offered for the key premise that P gains knowledge at t2 that affects his state at t3. What if he doesn't? I may have missed something, but Popper's argument seems blatantly to beg the question.

A second argument they give seems, if anything, worse. As near as I can make out, the contention is that, under certain assumptions, you cannot predict your future decisions. If you could, then you would know now what you would decide tomorrow. But then you would have already decided now to do the acts in question, and there would, against the hypothesis, be no future decisions. Hence self-prediction is impossible.

Well, let's run through an example. I claim to know that I shall decide to have cereal for breakfast tomorrow. Have I, as a result, *decided* now to have cereal tomorrow? For heaven's sake, why? I *shall* decide that tomorrow: this is precisely what I claim to know today. No reason at all has been given to think that believing correctly, at t1, that I shall decide to do something at t2 is to decide to do that thing at t1.

But suppose their argument is right. Where will that get them? I can, for all the argument has shown, perfectly predict my future actions. True, I would be deciding now to do them; but nevertheless I would know now what they are.

And why all the fuss about self prediction anyway? Suppose that you cannot predict your own future actions. Why can't someone else predict them? (Please do not respond: if he discloses the prediction to you, you might decide to act otherwise. If the prediction is correct, you will not.) In any event, the hated enemy, neoclassical economics, does not usually make predictions about particular actions of concrete individuals; what then is the relevance of our authors' arguments to economics?

I venture to predict that O'Driscoll and Rizzo will respond that I have totally misjudged the depth of their case. Profound metaphysical arguments, advanced by the French philosopher Henri Bergson, show that one must view the future as uncertain in order to experience time at all.

Individuals do not experience time in dimensionless points. "Hearing only one note of a melody, for example, is insufficient to capture the experience of music. This is because our perception involves memory of the just-elapsed phases (or notes) and anticipation of those yet to come. The actual experience is thus more than a mathematical constant" (p. 60).

So far, so good; I, at any rate, find nothing implausible in this. But, to our authors, the "dynamic continuity" of time has momentous consequence, as Bergson has brought out. Time is experienced as memory and

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anticipation; absent genuine novelty, then, time could not be experienced at all. "[T]he passage of time involves 'creative evolution'; that is, processes produce unpredictable change.... If change is real, it cannot be completely deterministic: there must be scope for surprise" (p. 62).

A closer look at their musical example will at once show the fallacy. If I hear the opening bars of Beethoven's Third Symphony, I know perfectly well what is coming next. The fact that I know what is coming does *not* block my anticipation of what is to come: quite the contrary, it constitutes it. O'Driscoll and Rizzo (and, if they expound him correctly, Bergson) have confused expecting something to happen with being surprised by a future event. The content of a genuine surprise is just what cannot be anticipated. (I can, of course, expect to be surprised and turn out to be surprised by what takes place.)

Reviewers often criticize authors by saying: you did not cite *a*, you ought to have taken account of definitive work *b*, etc. This very often is unfair: a reviewer can practically always locate some obscure work that his victim (sorry: subject) has failed to consult.

Having said this, I fear that I am now about to indulge in exactly this sort of criticism—with what degree of fairness my readers must judge.

The authors would be well advised to give the philosophy of time a rest.

Although the authors are in general impressively erudite, they do not display familiarity with treatments of time by analytic philosophers. One misses—or at any rate I miss—reference to Grünbaum, van Fraassen, Putnam, etc. I venture to suggest that if they knew this literature, they would see that the case for Bergsonian time is not so simple as they make out. Adolf Grünbaum's discussion of the Bergsonian philosopher Capek, whom they cite extensively, would have been useful to take into account.

On occasion, unfamiliarity with the subject seems clearly in evidence. In his Introduction, Professor Rizzo gets exactly backward what William James meant by the "specious present." "The denial of time consciousness is inherently self-contradictory from the perspective of the agent. This is because the instantaneous (or mathematical) present is 'specious'" (p. xv). But the specious present is not the instantaneous present, on James's account. The claim Rizzo is so anxious to make, that we perceive time as a flow that incorporates past and future moments, *is* the Jamesian specious present. Rizzo, did he but know it, is himself an advocate of the specious present.

Fortunately for our authors, their confusions about time do not fatally

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disable the economic sections of their book. They regard their economic discussions as applications of their philosophical analysis; but in my view they are wrong to do so. (For this reason, I deliberately called their Part I their "second" book.) They would be well advised to give the philosophy of time a rest; otherwise they will continue "in wand'ring mazes lost." ✦

Who's in Charge?

PRESIDENTIAL WAR POWER
Louis Fisher
University Press of Kansas, 1995. xvi + 245 pgs.

The conduct of contemporary American foreign policy flies in the face of the Constitution and much of our history. Of this unfortunate circumstance, readers of Louis Fisher's definitive book will have no doubt. Today, President Clinton claims, on his authority as Commander-in-Chief, the power to commit American troops to Bosnia and elsewhere, without the consent of Congress. Like his predecessor George Bush in the Gulf War, he avers that he may act in entire independence of Congress: the president is supreme in foreign policy. Though the cooperation of Congress in foreign adventures may be sought, this is a matter of political convenience rather than legal necessity.

Louis Fisher, probably the foremost expert on the legal questions involved, rejects entirely the self-serving view of our beloved chief magistrate. The Constitution states without ambiguity that Congress, not the President, has the power to declare war. As Fisher makes abundantly clear, the framers had good reason for their language.

Under the British system of government, the power to declare war rested solely with the king; likewise, it was his prerogative to make treaties that could irrevocably bind his subjects. "These models of executive power were well known to the framers. They knew that their forebears in England had committed to the executive the power to go to war. However, when they declared their independence from England, they rested *all* executive process in the Continental Congress" (p. 2).

In so doing, the American revolutionaries broke with John Locke. As Fisher notes, Locke in the *Second Treatise* associated the power of war and peace, which he termed the federative power, with the executive. To the framers, this assignment of power threatened tyranny; in so concluding, they were, I suggest, better Lockeans than Locke himself.

The delegates to the Philadelphia convention continued to adhere to

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the revolutionaries' view of the question. "On numerous occasions the delegates to the constitutional convention emphasized that the power of peace and war associated with monarchy would not be given to the President" (p. 4). Even so ardent a supporter of a strong executive as Alexander Hamilton concurred in the common view.

True, the Congress delegated power to Washington: but it was theirs to delegate.

An objection at once arises to Fisher's contention. No doubt, as he says, the Constitution gives to Congress alone the power to declare war. But is this not a mere formality? The President remains free to send troops into combat as he wishes, through his power as Commander-in-Chief. The clause in question merely restrains him from calling his expeditions "wars" on his own volition. So what?

Our author easily turns this objection aside. Like the Continental Congress, the U.S. Congress's authority extended both "to 'perfect' and 'imperfect' wars—to wars that were formally declared by Congress and those that were merely authorized" (p. 2). Fisher emphasizes especially that Congress, not the president, had the constitutional power to authorize private citizens to use armed force against foreign nations, through letters of marque and reprisal.

If thwarted by the text of the Constitution, supporters of presidential power are apt to turn to the Republic's early history. Did not Washington and Jefferson both commit forces to combat without a congressional declaration of war? What of the Indian Wars, the Whiskey Rebellion, and the campaigns against the Barbary pirates?

One of the book's great strengths is its forthright exposure of the myth that the executive in these instances acted independently. In each case, Fisher shows, the president acted with the full consent of Congress.

"Recent studies by the Justice Department and statements made during congressional debate imply that Jefferson took military measures against the Barbary powers without seeking the approval or authority of Congress. In fact, in at least ten statutes, Congress explicitly authorized military action by presidents Jefferson and Madison" (p. 26, footnote number omitted). Those seeking full details of each example must of course consult the book; after Fisher's painstaking survey, the matter admits of no doubt.

In one particular, I venture to suggest that Fisher might have strengthened even further his already overwhelming presentation. He notes Raoul Berger's citation of the Continental Congress's detailed instructions to

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George Washington as evidence of the narrow scope accorded the commander-in-chief. But he finds fault with Berger's analysis. The Congress often made "extensive delegations" of authority to Washington (p. 11). Further, the limits on an officer subordinate to Congress need not apply to the president, who heads a coequal branch of the government.

Fisher's objections do not speak directly to Berger's argument. True, the Congress delegated power to Washington: but it was theirs to delegate, as Berger's citation of the instructions to Washington shows. And the issue in dispute is not whether the president has more power than a general of the revolutionary army; rather, the question is what power derives from his designation as commander-in-chief. Here, Berger's resort to contemporary usage of the phrase is entirely on point.

If, though, the case for Congressional authority over war is as strong as Fisher alleges, how did we get where we are today? During the first half of the nineteenth century, presidents usually adhered to constitutional requirements, although James Polk behaved in highly dubious fashion during the Mexican War. Of course matters were different with Abraham Lincoln, that fount of all things unconstitutional. "In April 1861, with Congress in recess, he [Lincoln] issued proclamations calling forth the state militia, suspending the writ of habeas corpus, and placing a blockade on the rebellious states" (p. 38). Yet even Lincoln acknowledged that he had acted *ultra vires* and sought subsequent Congressional approval to make good his illegalities.

As Fisher notes, Woodrow Wilson's violation of the Constitution proceeded from long meditated plans.

If, much against our instincts, Lincoln cannot be saddled with the full blame for presidential usurpation of the war power, who can? Fisher tells a long and involved story, but two presidents especially merit a place in the rogue's gallery.

As Fisher notes, Woodrow Wilson's violation of the Constitution proceeded from long meditated plans. Although the Constitution provides for treaties to be made by the president with the "advice and consent of the Senate," Wilson in two books openly expressed his contempt for this limit to executive power. By his power to take unilateral initiatives, the president could create a situation in which Congress would have no alternative but to back the

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president. "The initiative in foreign affairs, which the President possesses without any restriction whatever, is virtually the power to control them absolutely" (p. 72, quoting Wilson, *Constitutional Government in the United States*).

When elected president, Wilson adhered faithfully to his designs; but as the battle over the Treaty of Versailles showed all too well, he could not bludgeon Congress into acknowledging the dominance in foreign affairs he claimed. With Harry Truman, who shared Wilson's bloated conception of executive power, matters proved far different.

Recent presidents have done their best to thwart Congressional attempts to rein in the plenary powers they claim for themselves.

During the Korean War, Congress was more than willing to give Truman full support for his military moves in Asia. But he disdained the legislative branch's approval. In his view, he did not require its consent to send American troops into battle. Congress might accede if it wished; the question was really of no moment. "President Truman did not seek the approval of members of Congress for his military actions in Korea. As [Secretary of State] Acheson suggested, Truman might only wish to 'tell them what had been decided'" (p. 86).

I need not fear spoiling the reader's surprise if I reveal that the modern Supreme Court has not stood foremost as a champion of the original understanding of the Constitution. Oddly enough, though, a key decision upholding executive supremacy in foreign affairs came from George Sutherland, normally a highly conservative justice. Sutherland, one of the Supreme Court's "Four Horsemen of Reaction," did not hesitate to strike down New Deal domestic legislation as unconstitutional. Yet in foreign affairs he saw matters in an entirely different light.

In the *Curtiss-Wright* case (1936), Sutherland held that the president's power in foreign affairs existed in entire independence from the Constitution. The power to conduct foreign relations is an "inherent attribute of sovereignty." As such, it passed upon independence directly from the British Crown to the colonies collectively. Somehow, though Sutherland did not make clear in exactly what fashion, the power migrated to the Chief Executive.

Fisher crisply and clearly dissects Sutherland's opinion, and fortunately in recent years the Court has retreated from its extreme language. Our author sees in this a sign of hope.

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Indeed, he is generally an optimist, believing that if Congress resolutely asserts its constitutional prerogative, the president will be forced to comply with its wishes. He supports his opinion through a detailed account of the War Powers Resolution of 1973.

One may hope that he is right; but even if Congress does assert its authority, the battle is liable to be difficult. Recent presidents, not least among them Bush and Clinton, have done their best to thwart Congressional attempts to rein in the plenary powers they claim for themselves.

Fisher's carefully presented book requires us to answer an underlying question. Granted that the author's constitutional argument is correct, why does this matter for us now? Fisher does not address the issue in elaborate detail, but the response is sufficiently obvious. Congressional authority over war provides an indispensable means to curb a president intent on foreign adventures.

Though Fisher well states the essentials of the case, his book can here usefully be supplemented with the excellent work of John Hart Ely, *War and Responsibility*, which was reviewed in these pages on an earlier occasion (*Mises Review*, Spring 1996, pp. 10–13). More generally, the two books are near perfect complements: Ely is a master of argumentative subtlety, while Fisher excels in historical research.

But what if, against all expectation, the president proves less bellicose than Congress? Here a non-interventionist need fear nothing, since matters are likely to work out as he desires. As commander-in-chief, the president *does* possess some real powers, and one of them may be used to block an overly aggressive Congress.

Fisher makes this clear through an amusing anecdote about Grover Cleveland. When members of Congress pressed for war with Spain, "Cleveland responded bluntly. 'There will be no war with Spain over Cuba while I am President.' A member of Congress protested that the Constitution gave Congress the right to declare war, but Cleveland countered by saying that the Constitution also made him Commander-in-Chief and 'I will not mobilize the army'" (p. 42). *This* kind of presidential defiance we can tolerate. ✦

A Case Not Closed

SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE
Robert H. Bork
Regan Books/Harper Collins, 1996, xiv + 382 pgs.

With ample reason, Robert Bork indicts contemporary American culture. But he in part misidentifies what is responsible for our current predicament;

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and as a result, he grossly misunderstands classical liberalism. His rejection of classical liberalism leads him to embrace dangerous doctrine.

Our author considers a number of grave social problems, devoting a chapter to each: these include pornography, abuses of the welfare system, "killing for convenience," and the rise of nihilism in many subjects previously regarded as academic disciplines.

His discussion of abortion seems to me especially insightful. As he rightly points out, the Supreme Court in *Roe v. Wade* erred in taking it to be controversial whether a fetus is a human being. "The question of whether abortion is the termination of a human life is a relatively simple one.... It is impossible to draw a line anywhere after the moment of fertilization and say that before this point the creature is not human but after this point it is. It has all the attributes of a human from the beginning, and those attributes were in the forty-six chromosomes with which it began" (pp. 174–75).

Bork does not argue that this suffices to show that all abortions are morally wrong. But granted that the fetus is human, may it be killed "simply for convenience"? Surely it is wrong to do so.

Our author is not really at home with philosophical arguments.

Even in this excellent chapter, however, a weakness is manifest. Our author is not really at home with philosophical arguments. (He of course is highly adept at legal reasoning; but mastery of law need not bring with it skill in philosophy.) As an example, someone who denies that abortion is murder need not, as Bork thinks, doubt that the fetus is a human being. He may instead hold that not all human beings are persons, but only persons have rights. I entirely agree that this is a dangerous doctrine: in practice it would quickly lead to self-styled experts deciding who is fit to live.

But whatever the bad consequences of this view, Bork has not shown that it is false. Bork states: "The characteristics of appearance, sentience, ability to live without assistance, and being valued by others cannot be the characteristics that entitle you to sufficient moral respect to go on living" (p. 177).

But to say this does not suffice: Bork needs to confront the arguments of those who claim just what he denies. Bork might respond that he does not need at all to argue for his view: ultimate issues of morality are not amendable to argument. "[M]orals or ethics...cannot be reached by reason" (p. 275). If so, why need he argue for the truth of his contention?

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Does this not push the problem back one step? Kant famously thought that morality can be derived rationally; and among philosophers he is not alone in this belief. Bork thinks it mistaken: but, once more, this must be shown and not merely stated.

I do not mean to rule out of court the view that morality consists of certain ultimate judgments that cannot be further justified. Quite the contrary, this theory strikes me as very much a live option. But this is just the point. Intuitionism is a moral theory, one among several other contenders, that must be defended by argument.

Bork's failure to set forward his arguments rigorously leads to a crucial error in his approach to constitutional interpretation.

Bork's failure to set forward his arguments rigorously leads to a crucial error in his approach to constitutional interpretation. He rightly castigates the Supreme Court for imposing leftist dogmas. Judges should not enact their own preferences into law but should be bound by original intent.

Excellent. But what does our author mean by original intent? He confuses two distinct questions: what did the framers of a law intend by what they enacted? and what was the end or purpose they sought by their enactment? No doubt the answer to each question may prove crucial to help us answer the other; but an example readily shows that the two questions are not the same.

In Bork's view, the framers of the First Amendment wished to protect political speech. "In a republic, where the polls are open and elected representatives make the law, there can be no value in speech advocating the closing of the polls or nullifying the effects of laws democratically made" (p. 102). Suppose that Bork is right: the framers valued political speech of a certain type and for this reason promulgated the First Amendment.

Does it follow that the First Amendment protects only political speech of the relevant kind? No, it does not. The framers, we assume, did not value certain types of speech; but this does not entail that they excluded the speech they did not value from protection. One way to protect political speech is to protect all speech. To show that certain forms of expression do not fall within the Amendment's scope, Bork needs to show that the framers did not adopt this strategy. And to show *this*, once more it is not sufficient to show that their motive was to protect political speech.

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Exactly the same fallacy vitiates Bork's discussion of the Second Amendment. Although an opponent of gun control, Bork refuses to regard the issue as a constitutional one. "The Second Amendment was designed to allow states to defend themselves against a possibly tyrannical national government. Now that the federal government has stealth bombers and nuclear weapons, it is hard to imagine what people would need to keep in the garage to serve that purpose" (p. 166n).

His assault on modern liberalism is on target; but his presentation of classical liberalism is a caricature.

As before, let us suppose Bork is entirely right about why the framers enacted this amendment. It does not follow that if the aim they sought can no longer be achieved by allowing individuals to keep and bear arms, then individuals no longer have those rights. In a way that should by now be obvious, Bork confuses our two questions.

But let us return from the constitution to contemporary moral issues. What is responsible, in Bork's view, for much of our current plight is modern liberalism. And modern liberalism has developed from classical liberalism. "Liberalism always had the tendency to become modern liberalism" (p. 8).

But why does Bork think this? In his view, two doctrines underlie liberalism: individualism and egalitarianism. These doctrines need not lead to disaster; if a society limits their application by discipline and restraint, matters will go reasonably well.

"Men were kept from rootless hedonism, which is the end stage of unconfined individualism, by religion, morality, and law—To them I would add the necessity for hard work, usually physical work, and the fear of want" (p. 8). Absent these restraints, classical liberalism degenerates into *radical* individualism and egalitarianism, the defining characteristics of modern liberalism.

Bork once more combines insight and error in an odd mixture. His assault on modern liberalism is on target; but his presentation of classical liberalism is a caricature. The individualism of the classical liberals does not stem from the pursuit of self-gratification, but from a view of the requirements of natural law. And egalitarianism seems to me not a principle of the classical doctrine at all.

Our author's misleading view of classical liberalism in part stems from his taking John Stuart Mill, rather than Locke, as the key philosopher of the movement. What little he does

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say about Locke is mistaken. He did not hold an optimistic view of man, nor did he believe that man is "inherently self-sufficing" and autonomous, Robert Nisbet to the contrary notwithstanding. In my view, he is most plausibly read as a somewhat heterodox Calvinist.

This, admittedly, is controversial; but Bork's principal point fails even if I am wrong about Locke. Bork himself acknowledges that modern liberalism "has now turned classical liberalism upside down with respect to both liberty and equality" (p. 329). If so, why take the two divergent doctrines as parts of a continuous movement?

And Bork's conflation of classical and modern liberalism is no mere mistake of theory. Since he rejects individual rights, as the classical view professes them, nothing stands in the way of a virulent statism. Thus, censorship is the order of the day. Those who protested spending public funds on Robert Mapplethorpe's obscenities have missed the real issue, according to our author. "To complain about the source of the dollars involved is to cheapen a moral position" (p. 150).

What could be more ridiculous than people thinking they are entitled to their own money? "[A]s if taxpayers should never be required to subsidize things they don't like. If that were the case, government would have to close down altogether. Both spending and taxation would be at zero" (p. 150). The omnicompetent state is, for Bork, not a monster to be dispatched but a tool to be used. Whether the state is likely to enforce the values he favors is a question he leaves unexamined.

Our author's statism extends beyond culture. He gives as an example of a "demonstrably irrational" proposal "reviving the Tenth Amendment to confine the federal government to the enumerated powers" (p. 270). Why, this would mean "the end of Social Security and Medicare" (p. 276). How dreadful! ✦

Judges Shall Be As Gods

OVERCOMING LAW
Richard A. Posner
Harvard University Press, 1995, x + 597 pgs.

To most conservatives, constitutional interpretation is straightforward. The judge's task is to understand the Constitution as intended by its authors. A judge must not anachronistically impose his own social philosophy on the document; and the principal complaint against "liberal" judges is that they commit this sin. Notoriously, for example, the Warren Court preferred its understanding of Gunnar Myrdal and Kenneth Clark over

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the legislative history of the Fourteenth Amendment.

Much of Richard Posner's long and learned volume is devoted to an assault on "originalism." More exactly, the book's principal target is a general category, "formalism" of which originalism is alleged to be a species. Formalism resists exact definition; but, roughly, it holds that law is a fixed body of principles that may be analyzed without the use of other disciplines, especially the social sciences.

Why is the Supreme Court a roving body to solve social problems?

Our author, who is Chief Judge of the United States Court of Appeals, Seventh Circuit, was in an earlier incarnation the leading academic advocate of law-and-economics, a doctrine in which he still devoutly believes. To paraphrase Hume, law-and-economics maintains that "law is, and ought only to be, the slave of wealth maximization." Holders of this position, as can well be imagined, do not look on originalism with entire favor. Were one restricted to the text, the pursuit of wealth might be hindered.

What has Posner to say against interpreting the Constitution as written? His key argument is this: "Many provisions of the Constitution...are drafted in general terms. This creates flexibility in the face of unforeseen change, but it also creates the possibility of alternative interpretations, and this possibility is an embarrassment for a theory of judicial legitimacy that denies that judges have any right to exercise discretion" (p. 233). Given an indeterminate text, a judge must choose; and to choose properly he must weigh consequences.

Judge Posner of course is right that much of the Constitution is in form general: "The freedom of speech," "the equal protection of the laws," etc. But it does not follow from this that these provisions are indeterminate in meaning. Posner's argument, when pressed, seems to be that unless we do take the general provisions as indeterminate, we shall be unable to cope with new conditions. The poor, benighted framers could not possibly anticipate what we know today—especially if we have thoroughly studied Posner's *opera omnia*.

To make good his argument, Posner needs to give examples of general constitutional provisions that, if "inflexibly" interpreted, eventuate in disaster; but he fails to do so. In fact, Posner himself in another context notes an instance that goes strongly against his view, though he fails to draw the connection.

During the early years of the New Deal, the Supreme Court used an "inflexible" interpretation of parts of the Constitution, e.g., the commerce clause, to strike down key legislation of the Rooseveltian New Order. Many

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legal "progressives" maintained that strict construction placed needed social reform in a straitjacket.

Did the Court do this? In fact, the situation is entirely the reverse: had the Court invalidated more New Deal nostrums, we would nearly all have been better off. Let Posner tell the story: "Many New Deal programs were aimed at raising prices and wages, and by thus reducing economic growth and employment programs delayed the recovery from the Depression as did (in all likelihood) the spirit of restless experimentation and of hostility to business that was characteristic of Roosevelt's pre-World War II Presidency" (p. 221). Hardly a point for flexible interpretation, is it?

But has Posner nothing at all to cite as an example of the disasters of originalism? It transpires that he does indeed have a case in mind: that old warhorse, *Brown* v. *Board of Education*. Had Earl Warren paid attention to the historical context of the Fourteenth Amendment, "a history which indicates that the amendment had not been understood by its framers or supporters to require blacks to attend school with whites," he might never have been able to rule segregation unconstitutional (p. 225, Posner in a footnote cites an unpublished work by Michael McConnell which challenges this view of the legislative history. But I venture to suggest that Raoul Berger, whom Posner does not cite, has conclusively shown that the quoted view is correct).

There we have it. Originalism leads to the rejection of *Brown*; *Brown* is sacred; therefore, originalism has been "weighed, and found wanting in the balance." This, I suggest, is the essence of Posner's case against strict construction.

He berates the legal theorist Herbert Wechsler for criticizing *Brown*; although a devout liberal, Wechsler found himself unable to arrive at "neutral principles" on which *Brown* could be defended. "One might have supposed that the central question in *Brown* v. *Board of Education* was not the scope of some abstract principle of freedom of association but whether racial segregation of public facilities in the South was intended or likely to keep the blacks in their traditionally subordinate position" (p. 72).

Perhaps it was; but why is the Supreme Court a roving body to solve social problems? And why must we choose between the preservation of enforced segregation and a "results-

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oriented" jurisprudence? Did these exhaust the alternatives in the 1950s and 60s? Posner gives us no reason to think so.

Posner does however make one effective point about the controversy over *Brown*. Many professed originalists defend *Brown*; and this they cannot with consistency do (unless they read the legislative history aberrantly). Thus, Robert Bork builds up "an unanswerable case on his own [originalist] terms" against *Brown*, but "flinches" from accepting the implication of his own analysis (p. 247). He too wishes to retain *Brown*.

Of course, Posner does not, as he should, condemn Bork for flinching. His point, to reiterate, is that given *Brown* as a "sacred cow" (p. 249), we must embrace a judicial philosophy that entails that the case was rightly decided.

Our author is alert to an objection. Is it not undemocratic for a small group of judges, who hold office for life, to impose their conception of the good on the rest of us? Unlike Bork, Posner does not flinch. He responds, what is so good about unlimited democracy? "Liberalism is in tension with democracy. Democracy is a means not only of dispersing political power and thus of protecting the private sphere against invasion by the public sphere, but also of enabling people to enforce their dislike of other people's self-regarding behavior" (p. 25).

Further, democracy often fails adequately to reflect the preferences of the majority. A "large and amorphous majority" may be at the mercy of a cohesive special-interest group, which can often "use the political process to transfer wealth to itself" (p. 203). And representatives often do not carry out the wishes of the electors: "They have their own interests, selfish and otherwise" (p. 203).

We may simply ask: why should an elite coterie of judges rule over us?

Posner's challenge to unlimited democracy is effective; but his style of jurisprudence remains vulnerable to a variant of the objection from democracy. We may simply ask: why should an elite coterie of judges rule over us? *This* objection does not assume anything at all about democracy; but it requires an answer. Preoccupied with his view that judges should decide cases by their consequences, he fails to ask what consequences justify the existence of a Supreme Court at all.

I have so far been unjust to Judge Posner; and this, in a review of a work of legal theory, will never do. His criticism of originalism is not freestanding but is embedded in a larger philosophy, pragmatism, which supports his emphasis on consequences.

On second thought, I withdraw my admission of injustice. Pragmatism as

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professed by our oracle is monumentally silly. The "support" it offers his jurisprudence is, in Lenin's phrase, "the support which a rope gives a hanging man."

Posner's variety of pragmatist is "skeptical about claims that we can have justified confidence in having arrived at the final truth about anything. Most of our certitudes are simply the beliefs current in whatever community we happen to belong to" (p. 5). We accept such facts as the existence of the external world because it would be disorienting for us to dislodge them.

But even the most unshakable facts are not certain. "One can only pretend" to doubt that the world exists independently of oneself and similar bedrock beliefs. "Yet while unable to doubt them in the sense of being willing to act on our doubts, we can accept intellectually the possibility that they will someday be supplanted by fundamental beliefs equally unshakable—and transient" (p. 5).

I freely confess that I am entirely unable to grasp how belief in the external world might be "supplanted." To put words together in meaningless strings, as Posner does here, hardly qualifies as philosophy. Let us pass by Posner's effusions "in silent contempt," as Dante says.

Posner reads remarkably widely; but his reading is not always accurate. Cardinal Bellarmine did not refuse to look through Galileo's telescope; or if he did, history does not record it (p. 344). Pascal did not maintain that belief is "entirely voluntary" (p. 502); his discussion of the wager explicitly takes account of the involuntary aspect of belief. The radio commentator Dennis Prager is not a rabbi (p. 573). None of the construals Posner offers for "bounded rationality" captures what Oliver Williamson means by the term (pp. 435–36). Nelson Goodman's concept "grue" is not a metaphor (p. 524). But the problems of Posner's book go beyond details. The whole structure is rotten. ✦

In Defense of Women

"Feminism Is Not The Story of My Life": How Today's Feminist Elite has Lost Touch With the Real Concerns of Women
Elizabeth Fox-Genovese
Doubleday, 1996, x + 275 pgs.

Elizabeth Fox-Genovese has had an idea brilliant in its simplicity and common sense. Feminism arouses furious passions, as supporters and opponents incessantly battle one another. Each party remains committed to its own doctrine, and the endless polemics resolve nothing.

Here is where Fox-Genovese comes in. Why not find out from women themselves whether radical feminism adequately represents their

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concerns? This she proceeded to do, both through extensive personal interviews and analysis of polling data. The results of her research emerge with crystal clarity and will be no surprise to anyone who has glanced at the book's title.

Radical feminism paints a distorted picture of the way many women view their lives. According to the feminist writer Naomi Wolf, "our media-led culture conspires to keep women permanently insecure and anxious because they do not measure up to some abstract and unattainable standard of beauty." Concern with looks, she warned, "literally kills women, frequently through anorexia, sometimes through breast implants" (p. 39).

Radical feminism paints a distorted picture of the way many women view their lives.

Contrary to Wolf's portrayal, Fox-Genovese found among the women she interviewed an enjoyment of the "complexities of costuming." "Whatever the frustration and pain, most women clearly value the distinctly female core of their identities" (p. 56).

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If one issue serves as a litmus test for radical feminism, it is abortion on demand. Some feminists go so far as to say that "a woman's right to an 'effective abortion' may require killing a baby that survives abortion" (p. 91). Unrestricted access to abortion, to the radicals, "guarantees a woman's freedom" (p. 87).

Our author located no consensus on abortion among her interviewees. And this exactly contravenes feminist dogma. A great many women do not take the unrestricted right to abortion as basic to their freedom. And while most do think abortion justifiable in some cases, they refuse to regard women who oppose abortion as advocates of oppression. And, far from regarding children as a burden, most women, even those with careers, view raising children as essential to their well-being.

Fox-Genovese states her own position on abortion in this way: "Until we agree that at some point during a pregnancy the abortion of a fetus becomes the murder of a baby, we will continue to run the risk of measuring the sanctity of life by the yardstick of dollars and cents" (p. 107).

At one point in her discussion, our author goes astray. In *Planned Parenthood* v. *Casey* (1992), the Supreme Court

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did not, as she says, impose "new restrictions," such as a waiting period, on abortion (p. 103). Rather, the Court allowed state restrictions to this effect to stand. The decision does not compel the states to impose these limits. And it is surprising that she describes Richard Posner's *Sex and Reason* as "insightful" (p. 107, n.4). The book defends just the economistic approach to marriage and the family which she opposes. But these are minor criticisms.

How might radical feminists respond to Fox-Genovese's results? Probably, they would allege that women who reject feminist opinions do not properly understand their own interests. Women who do not reject the family are to the radicals victims of "false consciousness," in the Marxist phrase.

But it is the radicals themselves who are the deluded ones. They reject the lived experience of women for the dictates of an abstract ideology unsupported by rational argument. If that is not false consciousness, nothing is. Fox-Genovese's beautifully written book is must reading for anyone interested in feminism and (rather a larger group) for anyone interested in understanding women. ✦

The Ultimate Bailout

Jeff Madrick
"Social Security and Its Discontents"
The New York Review of Books
December 16, 1996, pp. 68–72

Jeff Madrick, an economic journalist of statist bent, shows us the mind of a true leftist at work. He begins by pooh-poohing the alarmists who predict a crisis for Social Security. True enough, by the year 2020, the system will owe "$200 to $300 billion a year" in benefits more than it raises in taxes (p. 68). In part, the difficulty arises because the federal government has spent funds from the misnamed "trust fund."

Why is this not a crisis? According to Madrick, a "modest increase" in Social Security taxes now could prevent the impending shortfall in funds. But, he admits, "Washington would likely squander" the increase in the trust fund that higher taxes would bring (p. 69). He suggests instead that the government invest part of the trust fund in common stocks instead of Treasury bonds. Madrick's "logic" arouses interest: since the government has squandered the trust fund, we might as well give it a stranglehold on the stock market as well. One suspects that what Madrick calls "moderate plans" are modest proposals in the sense of Jonathan Swift.

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Having shown to his own satisfaction that the "crisis" can be solved, Madrick himself admits that a further aspect of the problem stumps him. If the deficit in Medicare is taken together with that of Social Security, things do not look bright. "Social Security and Medicare could absorb more than 12 percent of the nation's GDP in 2020 and more than 15 percent in 2040...taxes would have to rise to 25 percent to 30 percent of wages to fund both programs unless changes are made" (p. 69).

Here then is how to defuse a crisis. Propose a solution; when you admit that it faces a fatal difficulty, toss up another; continue the remedy as necessary. Our author unfortunately forgets that you must not end up with one more problem than solutions.

And why go through the trouble? Isn't Social Security a poor "investment" for those not now of retirement age? Madrick admits that those "who retire today or in the future will receive an average return [on their contributions] of perhaps only a couple of percentage points. Higher-paid workers may well get back less than they contribute" (p. 70). Why raise taxes and turn the economy over to the government for such meager results?

But this misses the point, Madrick informs us. The Social Security program "was never originally designed to give workers the highest possible return on their invested payments" (p. 70). Quite the contrary, it aims at redistribution of income.

Why then include nearly everyone in the program? Need one ask? It is to gain political support for it. If the redistributive aims were openly avowed, the American people might be unwilling to tender the degree of support our Washington masters think required. "The unspoken appeal of privatization [of Social Security and Medicare] may well be that it allows the middle class to reduce its commitment to help those who are less fortunate" (p. 72).

Plainly put, Madrick thinks that people are too stupid to notice that they are supporting more redistribution.

Look at the "hardship" inflicted on hundreds of thousands of children, Madrick laments, by cuts in daycare programs. Who can doubt that the American public is too "callous" to be left to its own devices? "If day care or early educational programs were available to 90 percent of *all* American children...they would be far less likely to lose political support" (p. 72).

Plainly put, Madrick thinks that people are too stupid to notice that they are supporting more redistribution than they wish, if they are tossed a few crumbs. And why worry about cost? As Mr. Micawber said, "something will turn up." ✦

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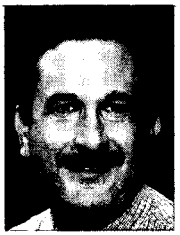

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